Supreme Court, U.S.
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No. 08-956

IN THE

Supreme Court of the United States

LARRY J. WINGET and the
LARRY J. WINGET LIVING TRUST,

Petitioners,

v.

JPMORGAN CHASE BANK, N.A., a national banking association, JPMORGAN CHASE & CO., a Delaware corporation, BLACK DIAMOND COMMERCIAL FINANCE, LLC, a Delaware limited liability company, BLACK DIAMOND CAPITAL MANAGEMENT, LLC, a Delaware limited liability company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court resolve a conflict between the Sixth Circuit and the Third and the Eleventh Circuits as to whether entry of an interim bankruptcy sale order has *res judicata* effect on all non-core claims between creditors, regardless of whether those claims were actually litigated by the bankruptcy court?

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Larry J. Winget and the Larry J. Winget Living Trust (collectively referred to as "Petitioners") respectfully petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565 (6th Cir. 2008), was issued on August 11, 2008 (App. A). The Sixth Circuit denied Winget's timely petition for rehearing and rehearing *en banc* on October 29, 2008 (App. C), and issued its mandate on November 6, 2008. Winget had appealed to the Sixth Circuit from the March 7, 2007 order of the U.S. District Court for the Eastern District of Michigan (Cohn, J.) granting Defendants' motions to dismiss (App. B). On March 12, 2007, the district court entered judgment dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6) based on its March 7, 2007 order.

JURISDICTION

The Order of the Court of Appeals denying the petition of Winget and the Trust for rehearing and rehearing *en banc* was entered on October 29, 2008 (App. C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Case Summary.

Resolution of the intractable conflict among the circuit courts of appeal addressed in this Petition will have a major impact on the effectual and uniform administration of federal bankruptcy law. The *Winget* decision, *in which the Sixth Circuit openly rejects prior rulings by the Third and Eleventh Circuits on the same issue*, forces all bankruptcy creditors and interested parties potentially affected by a bankruptcy to litigate all possible non-core claims[1] in the bankruptcy court as soon as any party seeks an interim order conceivably implicating the same transaction. The decision will subject the Sixth Circuit bankruptcy courts—and all other circuits where the *res judicata* impact of interim bankruptcy orders is unclear—to a mounting quagmire of co creditors' claims having no, or only the most speculative, relationship to the debtor's estate.

This Court should reject the *res judicata* test adopted by the Sixth Circuit for application in bankruptcy cases because it turns the broad jurisdictional boundary of what a bankruptcy court *can* resolve into an unwieldy holding pen for claims it *must*

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1. A "core claim" arises under the Bankruptcy Code, or could only arise in the bankruptcy proceeding. *Sanders Confectionary Prods. v. Heller Fin. Inc.*, 973 F.2d 474, 483 (6th Cir. 1992). Petitioners' potential defensive claims which were dismissed by the district court as discussed herein, are "non-core," arising under state law outside the bankruptcy proceeding and not under the Bankruptcy Code. See *Celotex Corp. v. Edwards*, 514 U.S. 300, 309; 115 S.Ct. 1493 (1995).

resolve. The current economic climate having led to a remarkable increase in bankruptcy filings, resolution of this conflict, and the efficient application of bankruptcy law in each circuit, is of exceptional importance.[2] Grant of this Petition, and adoption by this Court of the law of the Third and Eleventh Circuits that only non-core claims that were actually litigated in the federal bankruptcy courts are subsequently barred by claim preclusion, would prevent an unnecessary and yet inevitable tide of non-core co-creditor litigation from flooding the already overflowing dockets of federal bankruptcy courts.[3]

II. Factual And Procedural Background.

In the 1970's, Larry J. Winget ("Winget") formed a company called Venture Holdings Company, LLC ("Venture"). Venture, its subsidiaries, and certain affiliated companies quickly grew into successful suppliers to the automotive industry.[4] In the 1990's

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2. Citing the Administrative Office of the U.S. Courts, the New York Times recently reported that more than a million people filed for bankruptcy in the twelve months ending September 2008, "a staggering 30 percent increase over the period a year earlier." *Bankruptcy As A Step To Solvency*, M.P. Dunleavy, New York Times, January 23, 2009.

3. Petitioners note that while adversary bankruptcy proceedings fell nationally in the twelve month period ending March 2008 by one percent (-1%), such proceedings *increased* by thirteen point nine percent (+13.9%) in the Sixth Circuit during the same period. Administrative Office of U.S. Courts, U.S. Bankruptcy Courts, Table F-8.

4. The affiliates pertinent to this Petition are herein referred to as the "Deluxe" companies.

Winget expanded internationally, purchasing automotive parts suppliers in Australia and South Africa (the "International Companies").

In 1999, Venture entered into a Credit Agreement with a consortium of lenders ("Consortium") which eventually included Black Diamond Commercial Finance LLC and Black Diamond Capital Management, LLC (collectively, "Black Diamond"). Defendant JPMorgan Chase Bank, N.A. ("Chase") acted as the "Administrative Agent" for the Consortium.

On October 21, 2002, an Eighth Amendment to that Credit Agreement was executed under which Winget and the Larry J. Winget Trust ("Trust") conditionally guaranteed Venture's obligations to the Consortium (the "Winget Guaranty"). Specifically, the "last resort" conditions of the Winget Guaranty allowed Chase to satisfy the guaranty from the proceeds of the Trust's pledged stock in the International Companies only after Chase had exhausted all "reasonable efforts" to satisfy the obligations from other Venture collateral.[5]

In March 2003, Venture commenced a Chapter 11 bankruptcy proceeding. In September 2003, as part of the effort to restructure Venture, Winget, the Trust and Venture, with the participation of Chase, executed a "Contribution Agreement" that provided Winget, through the Trust, would contribute the International Companies to Venture on the satisfaction of certain

5. As the Sixth Circuit recognized, the guaranties of both the Winget Trust and Larry Winget individually were subject to the same "last resort" conditions. *See Winget*, 537 F.3d at 567, 569.

conditions.[6] When Winget and the Trust terminated the Contribution Agreement for the failure of those conditions, the Consortium launched a scheme in May 2004 to force Winget, through his Trust, to contribute the International Companies to Venture by seizing control of the Deluxe companies (which were already subject to the Venture bankruptcy as collateral) and promptly driving them into bankruptcy, thereby dramatically diminishing their market value.

Apparently unmindful of the adage that "a bird in the hand is worth two in the bush," the Consortium viewed the potential addition of the International Companies' $250 Million in assets to the collateral pool as worth the precipitous devaluation its scheme caused to the collateral already in its possession, i.e., the Venture Debtor and the Deluxe companies. The scheme ultimately failed, however. In January 2005, the bankruptcy court ruled that Winget and the Trust had rightfully terminated the Contribution Agreement, and had no obligation to contribute the International Companies to Venture and the Consortium's collateral pool.

The Consortium's scheme not only failed to gain the International Companies for its collateral pool, it also provided Petitioners with cognizable defenses to any subsequent attempt by Chase to enforce the Winget Guaranty for the benefit of the Consortium.[7] Petitioners

6. The Trust controlled the International Companies through intermediate holding companies called P.I.M. Management Company and Venco #1 LLC.

7. Those defenses centered on the Consortium's breach of the "reasonable efforts" condition of the Winget Guaranty which occurred when it sacrificed the value of the Deluxe and Venture assets in its scheme to wrest control of the International Companies from Winget.

stood ready to assert those valid defensive claims should Chase attempt to enforce the guaranty in the Venture and Deluxe bankruptcies, in which Winget and the Consortium were co-creditors. Yet, no such attempt to enforce was made by Chase as a bankruptcy creditor and thus neither Chase's enforcement rights under the guaranty nor Petitioners' defenses to enforcement were ever litigated in the bankruptcy court. On April 19, 2005, the Bankruptcy court ordered the sale of substantially all of Venture and Deluxe's assets pursuant to Section 363 of the Bankruptcy Code (11 U.S.C. §363). The sale occurred in May 2005, and the proceeds of the sale were applied to Venture's outstanding balance under the Credit Agreement.[8]

In October 2005, after the §363 interim sale order but before entry of a confirmation order,[9] Chase filed an action in the United States District Court for the Eastern District of Michigan, Case No. 2:05-CV-74141 (the "'05 Case"), seeking declaratory and other relief under the Winget Guaranty. Petitioners answered and filed a counterclaim, which they timely amended, asserting for the first time their defensive claims related to Chase's breach of the Guaranty through its failure to properly marshal the assets of the Deluxe companies.

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8. However, as a result (at least in part) of Chase's scheme to devalue the Venture and Deluxe companies and thereby expose the International Companies to seizure, the sale proceeds failed to significantly diminish the debt outstanding under the Credit Agreement.

9. As of this writing, both the Venture and Deluxe bankruptcies remain open. No confirmation order has been entered.

On June 29, 2006, the district court entered an order dismissing the amended counterclaim without prejudice and directing Petitioners to file a new complaint in a separate, companion action so that their defenses could be independently litigated.[10]

Winget and the Trust then filed the action underlying this Petition, seeking for the first time a judicial ruling that Chase had breached the "all reasonable efforts" condition of the Winget Guaranty through its mishandling of the Deluxe company assets. On September 15, 2006, Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), arguing in pertinent part that Petitioners' previously unlitigated defensive claims were nonetheless barred, under the doctrine of *res judicata*, by the bankruptcy court's April 2005 interim §363 Order approving the sale of the Venture and Deluxe companies' assets.

On March 7, 2007, the district court granted Defendants' motions to dismiss, holding that Petitioners' claims based on Chase's alleged intentional devaluation of the Venture and Deluxe companies' assets were barred by *res judicata*, despite the fact that neither those defensive claims nor Chase's enforcement rights

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10. The district court later granted Chase's motion in the '05 Case to strike Petitioners' affirmative defenses (which tracked precisely the defensive claims he was ordered by the court to bring in the separate action), granted judgment on the pleadings on Chase's claim for specific performance, and dismissed without prejudice its claim for declaratory relief.

under the Guaranty had been actually litigated in the bankruptcy court.[11] (App. B).

On August 11, 2008, the Sixth Circuit Court of Appeals affirmed the district court's ruling (App. A). Openly acknowledging its rejection of settled law in the Third and Eleventh Circuits, the Sixth Circuit held that all non-core claims between bankruptcy creditors, even those not actually litigated by the bankruptcy court, are barred under the doctrine of *res judicata* after the entry of interim § 363 sale orders.

REASONS FOR GRANTING THE PETITION

I. The *Winget* Decision Creates A Conflict among the Circuits.

The four elements of *res judicata*, or "claim preclusion", are: (1) a final decision on the merits, (2) between the same parties, (3) in which the plaintiff litigated or should have litigated the same issue, (4) involving the same cause of action. See *New Hampshire v. Maine*, 532 U.S. 742, 748-749; 121 S.Ct. 1808 (2001); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797; 116 S.Ct. 1761 (1996); *Rawe v. Liberty Mut.*

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11. On March 12, 2007, Petitioners filed an Amended Complaint addressing the alleged deficiencies identified by the district court in its Order granting the 12(b)(6) motion, but the court ordered that pleading stricken and entered a judgment dismissing the case. On March 21, 2007, Petitioners moved for reconsideration of the dismissal. The district court denied that motion on April 12, 2007. Only the district court's March 7, 2007 dismissal of the unlitigated claims of Winget and the Trust on the basis of *res judicata* is at issue in this Petition (App. B).

Fire Ins. Co., 462 F.3d 521, 529 (6th Cir. 2006). This Petition addresses only the last two *res judicata* elements, and the pragmatic necessity of tailoring those "identity of claim" elements to the unique procedural and jurisdictional properties of bankruptcy litigation.

The Sixth Circuit decision in *Winget* expressly rejects Third and Eleventh Circuit Court of Appeals' claim preclusion jurisprudence on this same issue. Specifically, those Circuits have rationally articulated "identity of claims" tests for claim preclusion when applied to bankruptcy proceedings, holding that only non-core claims between creditors that were *actually* litigated or explicitly made part of the confirmation plan are precluded from subsequent litigation outside the bankruptcy context. *Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330, 337-38 (3d Cir. 2000) (a co-creditor claim should not be subsequently barred unless it is "so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum."); *In Re Atlanta Retail*, 456 F.3d 1277, 1289 (11th Cir. 2006) (*Res judicata* does not bar non-core co-creditor claims not raised in the bankruptcy proceeding unless "the resolution of that claim explicitly becomes an essential part of the bankruptcy plan."); compare *Winget*, 537 F.3d at 581. In *Winget*, the Sixth Circuit first cites the Third and Eleventh Circuits' specifically tailored *res judicata* tests for identity of claims in bankruptcy proceedings, then expressly rejects those tests, holding "[a]doption of such tests would not, however, be in line with current res judicata jurisprudence in this circuit, which has adopted the traditional view of identity as a res judicata element." *Id.* at 580-81.

The Third and Eleventh Circuits rightly recognize that "traditional" *res judicata* jurisprudence on claim identity, as applied by the Sixth Circuit, is ill-suited to the prompt, informal, multi-party resolutions favored by and employed under the Bankruptcy Code. See *Katchen v. Landy*, 382 U.S. 323, 328; 86 S.Ct. 467 (1966) ("this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'"), citing *Ex parte Christy*, 44 U.S. 292, 3 How. 292, 312 (1845); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490-491; 108 S.Ct. 1340 (1988) (recognizing the need for "prompt administration of claims" in bankruptcy); See also, Wright & Miller, 18 *Federal Prac. & Proc.* §4408, n. 35 ("the commonly multiparty nature of bankruptcy proceedings dictates that special care must be taken in defining the dimensions of a "claim" for purposes of precluding subsequent litigation outside the bankruptcy context.") As such, the already over-burdened federal bankruptcy system would be well served if this Court brought all circuits in line with the Third and Eleventh Circuits' reasoned rulings on identification of potentially precluded claims when the underlying litigation took place in the forum of bankruptcy. These rulings are discussed below.

A. *Winget* Puts the Sixth Circuit In Conflict With the Third: *Eastern Minerals & Chemicals Co. v. Mahan.*

In *Eastern Minerals*, the Third Circuit denied preclusive effect to a bankruptcy confirmation order even though the plaintiff Eastern Minerals had asserted a claim of equitable subordination in the bankruptcy proceeding against the bankrupt's alter ego and had actively opposed the sale of the bankrupt's assets. 225 F.3d at 332. Recognizing that the "[c]laim preclusion doctrine must be properly tailored to the unique circumstances that arise when the previous litigation took place in the context of a bankruptcy case," the court approached the question of "identity of claims" as follows:

> A claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum.

225 F.3d at 337-38 (footnotes omitted.) Applying these narrowed parameters of claim identity to account for the bankruptcy context, the court found that the claims at issue were not identical because "the theory of the case and the relief sought are markedly different from those underlying the draft complaint to subordinate . . . that Eastern considered filing in the bankruptcy court." *Id.*

Had the Sixth Circuit adopted the "identity of claims" test tailored by the Third Circuit to fit the unique circumstances arising in bankruptcy litigation, it would have been required to reverse the district court because it is undisputed that Petitioners did not actually litigate their defensive claims against co-creditor Chase linked to the Winget Guaranty in the Venture/Deluxe bankruptcies, and the issues resolved by the § 363 sale order were not remotely similar to Petitioners' claims.[12] Instead, the Sixth Circuit ignored the bankruptcy context and expressly rejected the Third Circuit's test. *Winget*, supra at 581. In so doing, the Sixth Circuit unnecessarily exposed the bankruptcy courts in its Circuit to a wave of non-core claims by creditors—particularly in large, complex Chapter 11 adversary proceedings—seeking, justifiably, to protect themselves from future assertions of claim preclusion.

The Sixth Circuit's erroneous expansion of the scope of claim preclusion to the farthest boundaries of the bankruptcy courts' broad jurisdiction over non-core claims will significantly impede resolution of core proceedings necessary for final resolution or reorganization of the debtor's estate. Because the analytical errors of the *Winget* decision will have devastating practical consequences for federal bankruptcy administration, this Petition should be granted and the *Winget* decision reversed.

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12. Those defensive claims against Chase did not attack the terms, process or consequences of the bankruptcy sale of the Venture and Deluxe assets. Indeed, Petitioners agreed that the April 2005 sale price for the assets was fair. Rather, Petitioners claim is that Chase acted unreasonably by not selling the collateral in May 2004, when its value was higher.

B. *Winget* Puts The Sixth Circuit In Conflict With the Eleventh: *In Re Atlanta Retail.*

In *Atlanta Retail*, the Eleventh Circuit joined the Third Circuit in recognizing that the unique multi-party nature of bankruptcy proceedings requires a specialized approach to defining a "claim" for purposes of *res judicata* in subsequent non-bankruptcy litigation. Expressly holding that a bankruptcy §363 sale order does not bar a claim for fraud asserted in state court by one creditor against another creditor, the Eleventh Circuit held:

> [R]es judicata does not require a creditor to raise an independent state law claim against a co-creditor in an adversary bankruptcy proceeding unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan.

Id. at 1280. The court rejected the claim of defendant Wachovia Bank that four interim bankruptcy orders, including a § 363 sale order and a confirmation order, involved the same cause of action as plaintiff Kodak's state court claim for fraud and breach of an inter-creditor agreement because none of those orders *required* the court to evaluate Wachovia's alleged fraud. *Id.* at 1289-90. In other words, the court determined that it is not whether a bankruptcy court has jurisdiction, but whether the court *needs* to resolve a claim as an integral part of the bankruptcy plan that determines whether *res judicata* should apply. *Id.* at 1288-89. Further, the court held that the bankruptcy proceedings could not bar the later claim

because they could not have awarded the plaintiff the relief it sought. *Id.* at 1285.[13]

The Sixth Circuit also specifically rejected this Eleventh Circuit test, choosing instead to broadly identify "claims" which must be brought in the context of bankruptcy (or face subsequent preclusion) to include all non-core claims between creditors, regardless of whether those claims were essential to the bankruptcy plan, and regardless of whether the bankruptcy court could fully and completely adjudicate the parties' rights or defenses. 537 F.3d at 581-81. The practical result of the Sixth Circuit's decision is to improperly set the boundaries of claim preclusion at the "sweeping limits of [the bankruptcy court's] jurisdiction." *In re Atlantic*, 456 F.3d at 1288. Grant of this Petition and reversal of the *Winget* decision will avoid the indefinite stalling of potentially hundreds of bankruptcy cases while ancillary disputes between creditors are being resolved.

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13. Similarly, if Petitioners had pressed their objections to the sale order, they could not have received the relief sought in their wrongly dismissed defensive claims; namely, cancellation of the Winget Guaranty. The most they could have achieved by challenging the bankruptcy sale motion was either denial of that motion to sell or subordination of Chase's rights as a creditor in the proceeds of the sale. Under either scenario, however, the Winget Guaranty would have remained in place and Petitioners' exposure thereunder would have actually increased, either by further deterioration in the value of the Venture assets over time or by a decrease in the value of Chase's claims due to subordination.

II. The Sixth Circuit Decision In *Winget* Threatens the Efficient and Just Administration of Bankrupt Estates.

A. *Winget* Is Wrongly Decided Because It Expands Claim Preclusion To The Limits Of Bankruptcy Jurisdiction.

In *Celotex Corp. v. Edwards*, 514 U.S. 300; 115 S.Ct. 1493 (1995), this Court recognized the intent of Congress "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Id.* at 307-08, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984). By creating a corresponding expansion of the preclusive effect of *res judicata* to the outer limits of that comprehensive "related to" bankruptcy jurisdiction, the Sixth Circuit in *Winget* fundamentally undermines Congress' intent, turning all claims that a bankruptcy court *could* resolve into claims it *must* resolve. As the Third and Eleventh Circuits properly recognized, efficiency and expediency cannot survive in an environment requiring joinder and resolution of all third-party creditor claims conceivably within the bankruptcy courts' jurisdiction.

Sagely preserving the intent of Congress to promote the efficient resolution of bankruptcy proceedings in the face of broad jurisdictional powers, the Third and Eleventh Circuits have adopted "identity of claims" tests which limit subsequent preclusion of non-core claims between creditors to those actually litigated in the bankruptcy or which were expressly integral to the bankruptcy confirmation plan. These tests give

bankruptcy courts the leeway they need to promptly and effectually resolve matters central to reorganization and fair distribution of bankrupt estates, even if those claims do not directly involve the debtor, while not burdening those courts with resolution of *all* non-core co-creditor claims over which it arguably has jurisdiction simply because the creditors' rights in those tangential claims *must* be resolved in that forum or be subsequently barred.

In *Celotex*, this Court cited with favor the Third Circuit's attempt to "strike an appropriate balance" between the potentially conflicting traits Congress has bestowed upon bankruptcy courts of wide-reaching jurisdictional power and yet "limited authority." *Id.* at 308; citing *Pacor*, supra at 994; *Board of Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32, 40; 112 S.Ct. 459 (1991). In a similar vein, the Third Circuit in *Eastern Minerals*, supra, again found an appropriate balance between the broad jurisdictional authority of bankruptcy courts and the harsh consequences of claim preclusion; this balance promotes thorough and prompt administration and resolution of bankrupt estates while preserving the rights of creditors to litigate non-core claims between themselves outside the bankruptcy forum. *Eastern Minerals & Chemicals Co.*, supra, 225 F.3d at 335-38. The Eleventh Circuit has struck a similar balance. *In re Atlantic Retail, Inc.*, 456 F.3d at 1284-89. The Sixth Circuit, in contrast, has expressly rejected such a balance. Its decision in *Winget* burdens the already swelling dockets of its bankruptcy courts with not just the authority, but the responsibility to resolve all non-core bankruptcy creditor claims arguably within its broad jurisdictional reach. *Winget*, 537 F.3d at 577-81.

B. *Winget* Expands the Much-Criticized Sixth Circuit Decision in *Browning v. Levy*, Applying Preclusive Effect to Interim Bankruptcy Sale Orders.

The adverse impact of the *Winget* opinion on the administration and resolution of bankrupt estates in the Sixth Circuit (and potentially other circuits where the law is unsettled) is most clearly signaled by its expansion of the holding of a prior Sixth Circuit Opinion, *Browning v. Levy*, 283 F.2d 761 (6th Cir. 2002).[14] *Browning* has been severely criticized for creating a *Catch 22* situation by broadly interpreting "identity of claims" in the context of a bankruptcy confirmation order while drastically limiting the ability of parties to reserve the right to litigate claims outside the bankruptcy courts.[15] Prior to

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14. See *Winget*, 537 F.3d at 578-79. The Sixth Circuit expressly expanded its prior ruling in *Browning* that the effect of bankruptcy confirmation orders is to "bar relitigation of any issues raised or that could have been raised in the confirmation proceeding," to include interim §363 sale orders.

15. *See, e.g.*, Wright, Miller & Cooper, *supra*, § 4470.3 (describing *Browning's* "breathtaking sweep for the claim preclusion effects of plan confirmation"); Goldstein, *Res Judicata Strikes Twice*, Am. Bankrtcy. Inst. J., Oct. 2002 at 16, 41 (court's reasoning will prevent many claimants from even getting a "first bite at the apple"); Klein, Ponoroff & Borrey, *Principals of Preclusion in Bankruptcy*, 79 Am. Bkrtcy. L. J. 839, 891 (2005) (concluding that *Browning* ignores the fundamental proposition that an *in rem* confirmation order "does not bind anyone with respect to a personal liability" except as provided in the plan; it "ignores the fact that confirmation proceedings [and, *a fortiori*, *in rem* proceedings such as § 363 sale orders] are not an efficient mechanism for resolving two-party disputes, and it "ignores the logic of the flexible bankruptcy process.")

Winget, application of *Browning* was confined to the narrow context of a final confirmation order. *Winget*, however, expands the criticized mandate of *Browning*,[16] holding that even an interim §363 bankruptcy sale order bars all subsequent attempts by creditors to bring non-core claims against other creditors outside the bankruptcy forum. *Winget*, supra at 578-579.

Thus, if *Winget* stands, all parties in Sixth Circuit bankruptcies, including creditors of the estate otherwise indifferent to such proposed interim orders, will be forced to immediately pursue all conceivable non-core claims against other creditors in accelerated interim bankruptcy proceedings, or face the risk of being held to have waived such claims in subsequent non-bankruptcy litigation. Petitioners respectfully request that this Court resolve the conflict among the circuit courts of appeal by reversing the Sixth Circuit's holding in *Winget* and adopting the Third and Eleventh Circuits' *res judicata* tests for identity of claims in the context of bankruptcy proceedings.

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16. *Browning* itself conflicts with the Third and Eleventh Circuits' decisions in *Eastern Mineral*, supra, and *In re Atlantic*, supra (respectively), both of which apply the narrowed test for identity of claims in bankruptcy to *all* bankruptcy orders, including final confirmation orders. *Eastern Minerals*, 225 F.3d at 339; *In re Atlantic*, 456 F.3d at 1290.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: January 27, 2009

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 11, 2008

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-1657

LARRY J. WINGET and the
LARRY J. WINGET LIVING TRUST,

Plaintiffs-Appellants,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN CHASE & CO., BLACK DIAMOND COMMERCIAL FINANCE, LLC, and BLACK DIAMOND CAPITAL MANAGEMENT LIVING TRUST, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroie.
No. 06-13490—Avern Cohn, District Judge

Argued: March 17, 2008.

Decided and Filed: August 11, 2008

Before: RYAN, SILER, and COLE, Circuit Judges.

Appendix A

OPINION

SILER, Circuit Judge. Through a series of transactions and agreements between 1999 and 2002, Defendants JP Morgan Chase Bank, N.A., and JP Morgan Chase & Co. (collectively, "JP Morgan"), served as the agent for a consortium of lenders that advanced credit to Venture Holdings Company, LLC ("Venture"), which was owned by Plaintiffs Larry J. Winget and the Larry J. Winget Living Trust (collectively, "Winget"). In 2002, JP Morgan and Winget executed the most recent and significant amendment to their original credit agreement, and, at the same time, also executed guarantees and pledges of collateral. These documents allowed JP Morgan significant access to Winget's companies, both Venture and its subsidiaries. As Venture's financial situation deteriorated and the company initiated bankruptcy proceedings, JP Morgan and the other lenders sought increasingly greater control over Winget's companies, eventually resulting in the takeover of one of Venture's subsidiaries. In an alleged attempt to force Winget into a financial settlement, JP Morgan and Defendants Black Diamond Commercial Finance, LLC, and Black Diamond Capital Management Living Trust (collectively, "Black Diamond") (collectively, JP Morgan and Black Diamond are the "Defendants") installed managers at Venture's subsidiaries that acted to significantly devalue the company's assets and initiate additional bankruptcy proceedings. Eventually, the assets of Venture and its subsidiaries were sold pursuant to Section 363 of the Bankruptcy Code. Winget brought its present claims of

breach of the guaranty and pledge agreements and requests for declaratory judgments, following a suit by JP Morgan, which sought inspection of the collateral. The district court dismissed Winget's complaint (the "Complaint"), holding that Winget's claims were barred by res judicata, and premature to the extent that they were claims regarding future attempts to repossess collateral. Without seeking leave of the court, Winget filed an amended complaint, which the district court struck. After filing, and losing, a motion for reconsideration, Winget appealed.

Winget now argues that the district court erred in (i) dismissing the Complaint without granting Winget leave to amend; (ii) striking Winget's amended complaint; (iii) failing to apply the correct standard of review when it dismissed the Complaint; (iv) looking to bankruptcy court orders in dismissing the Complaint; (v) not giving Winget the benefit of every inference from the allegations in the Complaint; (vi) ignoring Winget's defensive claims as a guarantor; (vii) holding that Winget's claims were barred by the April 2005 bankruptcy sale order; and (viii) holding that the claims asserted in the Complaint were premature.

We AFFIRM.

Appendix A

FACTUAL AND PROCEDURAL BACKGROUND

I. The Winget Companies

Beginning in the 1970s, Winget developed, owned, and controlled a network of companies that supplied plastic parts to automobile manufacturers. The backbone of this network was two companies, their affiliates, and subsidiaries: Venture and Deluxe Pattern Corporation ("Deluxe"). Winget personally owned, either directly or indirectly, one hundred percent of the equity of both Venture and Deluxe. Aside from Venture and Deluxe, Winget also owned P.I.M. Management Co. ("P.I.M."), a Michigan corporation, and Venco # 1, LLC ("Venco"), a Michigan limited liability company. In 1995, Winget purchased a foreign company that became Venture Asia Pacific ("Venture AP"), the stock of which P.I.M. held. At the time of this agreement, P.I.M. and Venco had a market value of approximately $250 million.

II. The Eighth Amendment, Winget Pledge, and Winget Guaranty

On May 27, 1999, a consortium of lenders consisting of JP Morgan, other banks, investment companies, and hedge funds (collectively, the "Lenders") provided credit to Venture pursuant to a credit agreement (the "Credit Agreement"). The parties subsequently amended the Credit Agreement eight times. The most recent, and only pertinent amendment here, was the Eighth Amendment (the "Eighth Amendment"), which was dated October 22, 2002, and executed in connection with

a complex "workout" negotiation initiated as a result of the rapid financial deterioration of Venture and significant default under the Credit Agreement.

a. The Eighth Amendment

Pursuant to this agreement, the Lenders "agreed (1) temporarily not to exercise available rights against Venture and the collateral supporting the loans, and (2) to extend further credit to Venture." In exchange for these terms and the extension of additional credit, Winget agreed to provide additional collateral to support the repayment of Venture's debt, and agreed to additional guaranties. Winget, P.I.M., Venco, and Deluxe all entered into separate guaranty agreements wherein each independently guaranteed certain collateral, which included stock in P.I.M. and Venco, and the collateral was pledged pursuant to pledge agreements. In some cases, these guaranties were enforceable solely through the stock from P.I.M. and Venco, as both companies pledged their respective interests in Venture AP and Venture Holdings. These guaranties were formalized in the Winget Guaranty, the Winget Pledge, and the Consortium Pledge, which were executed concurrently with the Eighth Amendment (collectively, all four documents are the "Guaranty Documents").

b. The Winget Guaranty, Winget Pledge, and Consortium Pledge

In the Winget Guaranty, executed October 21, 2002, Winget guaranteed Venture's debt, but the document

limited Winget's personal exposure, as JP Morgan's only recourse for payment on the Winget Guaranty was foreclosure on certain pledged stock, including P.I.M. and Venco's stock. JP Morgan was required to pursue any foreclosure under the Winget Guaranty pursuant to the terms of the Winget Pledges. The Winget Guaranty limited Winget's personal exposure to approximately $30 million.

The Winget Pledge, also executed October 21, 2002, significantly increased the amount of collateral available to the Lenders by covering Winget's equity interest in nine of its companies, which were under Deluxe's corporate umbrella. That same day, Winget also executed another pledge agreement that covered Winget's interests in P.I.M. and Venco (the "Consortium Pledge").

c. The Last Resort Conditions

As part of the Guaranty Documents, the Lenders included language that Winget refers to as the "Last Resort Conditions." The relevant portions of the Last Resort Conditions read:

> Notwithstanding anything herein or elsewhere to the contrary, [JP Morgan] shall not exercise any rights or remedies under this Pledge Agreement until all reasonable efforts shall have been made by it to collect the Obligations from other collateral held by [JP Morgan] . . . it being intended that the

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> Collateral provided by this Pledge Agreement shall be realized upon by [JP Morgan] only as a last resort.
>
> Notwithstanding anything herein or elsewhere to the contrary, no action will be brought for the repayment of the Guaranteed Obligations under this Guaranty and no judgment therefore will be obtained or enforced against Larry Winget other than with respect to the Pledged Stock in accordance with the provisions of the related Pledge Agreements, provided that the Guarantor shall be fully and personally liable for any damages arising from any violations of any of the agreements of the Guarantor herein in favor of the Lenders.
>
> [N]otwithstanding any other provision in this Pledge Agreement or elsewhere, in the event (i) that [JP Morgan] receives for application on the Obligations an amount of not less than $50,000,000 from the sale or financing of [Venture AP] or [Venture Holdings] operations or from one or more outsider sources . . . the obligations of the Pledgor hereunder shall be deemed satisfied and the pledge created hereby shall be terminated.

Aside from these three provisions, the Guaranty Documents also allegedly limited Winget's ability to operate Venco, P.I.M., and their subsidiaries through

the use of affirmative and negative covenants. The result of the provisions was that the Guaranty Documents were only enforceable from the proceeds of the sale of the interests in the pledged companies, namely Deluxe, P.I.M., Venco, and their subsidiaries (collectively, the "Pledged Companies"), and the Lenders could not attempt to enforce the Guaranty Documents until they had made all reasonable efforts to exhaust the collateral aside from the interests in the Pledged Companies. At any time, Winget could terminate the Guaranty Documents by tendering $50 million to JP Morgan for the benefit of the Lenders.

III. The Contribution Agreement and Bankruptcy Proceeding

On March 28, 2003, Venture and its subsidiaries filed for Chapter 11 bankruptcy in the Eastern District of Michigan (the "Bankruptcy Proceeding"). In order to allow Venture to exit the Bankruptcy Proceeding, Winget began negotiations with the Lenders, the result of which was an agreement (the "Contribution Agreement"), which was executed on September 23, 2003.

The Contribution Agreement called for a reorganization of Winget's companies, whereby Deluxe, P.I.M., Venco, and their subsidiaries would fall under the umbrella of Venture. Winget agreed to this restructuring in exchange for one hundred percent of the equity in the newly restructured Venture. Under the Contribution Agreement, Winget was not required

to agree to exit financing in an amount exceeding $85 million. Winget argued that its amount was critical to maintaining Venture; any amount under $85 million would provide Venture with insufficient liquidity to run the company, and any amount above $85 million would require payments that Venture would be unable to satisfy.

As the Bankruptcy Proceeding commenced, Black Diamond became the debtor-in-possession lender to Venture, financing the company's operation during the Bankruptcy Proceeding. In taking this position, Black Diamond acquired substantial interests from the Lenders, including JP Morgan's interest in its capacity as a lender.

In the months following the commencement of the Bankruptcy Proceeding, the Defendants began to negotiate with Venture and the unsecured creditors, without Winget's participation, to create another plan that would enable exit financing exceeding $85 million. Winget maintained that any such plan would be unenforceable per the terms of the Contribution Agreement, and alleged that with this knowledge, and Winget's expected rejection of a new plan, the Defendants formulated a "scheme" to coerce Winget into participation (the "Scheme").

IV. The Scheme

Winget alleged that the Defendants created the Scheme to coerce Winget to contribute its interests in

the Pledged Companies to the Lenders' collateral pool. Winget claimed that the Scheme was motivated by the Pledged Companies' market value of $250 million, which Winget believed the Defendants hoped to use as part of a foreclosure sale to satisfy Black Diamond and many of the Lenders. Winget alleged that the following were the principal components of the Scheme:

(i) the Defendants' agreement in April 2004 to provide Venture with financing to fund legal fees for a lawsuit against Winget purporting to seek $300 million;

(ii) "threats" by Black Diamond to stop making debtor-in-possession loans to Venture unless Deluxe filed a bankruptcy petition;

(iii) executing proxies to vote the shares of Deluxe as attorney-in-fact for Winget and voting those proxies to replace the directors of those companies with the Defendants' own nominees;

(iv) immediately upon taking control of Deluxe, removing Winget and others from management, replacing them with "inexperienced management" and committing to enforce the Contribution Agreement; and

(v) seeking enforcement of the Contribution Agreement for exit financing in an amount in excess of $85 million.

Winget further maintained that during a one-week period in May 2004, the Defendants and their attorneys drafted documents that allowed the Lenders to take over the control of Deluxe. In total, the documents (i) allowed the Lenders to remove the directors of Deluxe, (ii) installed new directors and managers chosen by the Defendants, and (iii) absolved these new directors of any liability resulting from the execution of the Defendants' directives. Winget claimed once in position, these new directors, who lacked experience in the automotive industry, began performing actions that devalued Deluxe to the extent that on May 24, 2004, Deluxe joined Venture in the Bankruptcy Proceeding, which was contemporaneous with the filing of an amendment to the Contribution Agreement. At the time of the filing, the combined value of the Pledged Companies and Venture's assets exceeded the debt Winget owed to the Lenders.

This amendment to the Contribution Agreement allowed for $125 million in exit financing. Winget objected and refused to perform the Contribution Agreement due to this amendment. On January 21, 2005, the bankruptcy court ordered the Contribution Agreement unenforceable against Winget due to the exit financing condition.

V. The Bankruptcy Court Order

On April 19, 2005, the bankruptcy court ordered the sale of substantially all of Venture and Deluxe's assets pursuant to Section 363 of the Bankruptcy Code (the "Sale Order"). The sale commenced in May 2005, and the proceeds of the sale were applied to Venture's outstanding balance under the Credit Agreement. Following the sale, however, a large amount of Venture's debt remained outstanding under the Credit Agreement.

VI. Procedural History

a. *JP Morgan Chase Bank, N.A. v. Winget*

On October 28, 2005, JP Morgan brought suit against Winget to (i) enforce its rights to monitor certain collateral under the Winget Guaranty, and (ii) obtain a declaratory judgment that it had satisfied the Last Resort Conditions. On June 29, 2006, after Winget filed an answer, affirmative defenses, and counterclaims, the district court ordered Winget's counterclaims severed from JP Morgan's suit and litigated in a parallel proceeding. The district court then declined to entertain the declaratory judgment claim, upon which JP Morgan moved for judgment on the pleadings on its claim for specific performance of its rights under the Guaranty Documents to monitor the pledged collateral. Winget appealed this decision and we affirmed the district court's decision. *JP Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 579 (6th Cir.2007) (holding that

the Last Resort Conditions did not apply to JP Morgan's inspection rights and that specific performance was the appropriate remedy).

b. The Present Case

After the district court severed Winget's counterclaims, Winget filed the Complaint on August 3, 2006. Winget asserted four counts in the Complaint. In Count One, Winget alleged that the Defendants breached the Guaranty Documents and Winget sought a declaration that it was no longer bound by its obligations under the Guaranty Documents. In Count Two, Winget sought a declaratory judgment to redefine and interpret the Last Resort Conditions. In Count Three, Winget sought damages for alleged impairment of collateral, namely impairment of Deluxe's value. In the final count, Count Four, Winget again asserted impairment of collateral, but asked the court to hold that the Lenders be allowed to purchase Winget's interest in Deluxe at its fair market value as of May 21, 2004.

On February 14, 2007, after the Defendants filed motions to dismiss the Complaint, the district court held a hearing on the motions. After further proceedings, the district court dismissed the Complaint, holding that Winget's claims were either barred by res judicata or were future claims that were premature. The district court held that because Winget's claims were based on the Scheme, Winget had an opportunity to litigate those claims before the bankruptcy court entered the Sale

Order. Further, the district court held that any claim based on future efforts of the Defendants to collect collateral was premature.

The district court made its ruling on the Defendants' motions on March 7, 2007 (the "Dismissal Order"), and filed its judgment on March 12, 2007. On March 12, 2007, before it received the judgment, Winget filed an amended complaint without leave of the court. The district court struck the amended complaint. On March 21, 2007, Winget filed a motion asking the district court to reconsider the Dismissal Order. On April 12, 2007, the district court denied the motion for reconsideration, noting that the arguments raised by Winget could have been raised in the initial briefing to the court. Even after considering Winget's "new" arguments, the district court determined the arguments did not alter the court's legal conclusions and that Winget's claims were barred by res judicata.

STANDARDS OF REVIEW

We review de novo a district court's dismissal of a complaint under Fed.R.Civ.P. 12(b)(6). *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir.1999). We review a district court's decision whether to permit a plaintiff to amend its complaint for abuse of discretion. *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 644 (6th Cir.2003) (citing *Shepherd v. Wellman*, 313 F.3d 963, 971 (6th Cir.2002)) (holding that we review a district court's decision to dismiss a claim with prejudice for abuse of discretion). However, when the district court

bases its denial of a motion to amend on the legal conclusion that the proposed amendment would not survive a motion to dismiss, we review the district court's decision de novo. *Greenberg,* 177 F.3d at 522.

The interpretation of a district court's order is a question of law and, consequently, subject to de novo review. *Brady v. McAllister (In re Brady),* 101 F.3d 1165, 1168 (6th Cir.1996).

We review de novo a district court's application of res judicata law. *Abbott v. Michigan,* 474 F.3d 324, 331 (6th Cir.2007) (citing *Bates v. Twp. of Van Buren,* 459 F.3d 731, 734 (6th Cir.2006)). The party asserting the defense of res judicata bears the burden of proof. *Browning v. Levy,* 283 F.3d 761, 772 (6th Cir.2002) (citing *Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp., Inc.),* 244 F.3d 1289, 1295 (6th Cir.2001)).

DISCUSSION

I. The district court acted within its discretion in dismissing the Complaint without leave to amend.

Because Winget did not request leave to amend the Complaint, the district court's decision not to grant leave to amend the Dismissal Order was within its discretion. The " 'district court does not abuse its discretion in failing to grant a party leave to amend where such leave is not sought.' " *Stambaugh v. Corrpro Cos.,* 116 Fed.Appx. 592, 598 (6th Cir.2004) (unpublished decision)

(quoting *Sinay*, 948 F.2d at 1042); *see also Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 853 (6th Cir.2006) ("The district court did not abuse its discretion by denying [the plaintiff's] first request for leave to amend her complaint because she failed to state the grounds for relief with particularity. . . ."). Requiring the district court to both state the reasons for its dismissal and then allow Winget to amend the Complaint without Winget's having asked permission would be akin to mandating the district court to issue an advisory opinion. "Plaintiffs [are] not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies." *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir.2004) (quoting *Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 784 (6th Cir.2000)) (emphasis in *Begala* omitted).

Winget argues that the district court was required to give him the opportunity to amend the Complaint and quotes *United States ex rel. Bledsoe*, 342 F.3d at 644, for this proposition: "[W]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the complaint with prejudice." (quoting *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir.1993)). While Winget correctly quotes *United States ex rel. Bledsoe*, it also states that, "Denial may be appropriate, however, where there is '. . . futility of the amendment . . . .' " (quoting *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir.2002)); *see Kottmyer v. Maas*, 436 F.3d 684, 692 (6th Cir.2006) ("A district court may deny

a plaintiff leave to amend his or her complaint . . . when the proposed amendment would be futile."). Futility is certainly the case here; Winget's claims were not dismissed for lack of specificity, failure to allege an element of a claim, or other deficiencies. Rather, Winget's claims were dismissed because they were either barred by res judicata or were premature. Regardless of the merits of these claims, or the various ways in which Winget might phrase them in subsequent complaints, Winget cannot pursue them.

Winget attempts to circumnavigate the res judicata and prematurity bars by arguing that it could have pled three additional matters that would have cured any defect in the Complaint. These matters are: (i) "the context of the Sale Order and the intent of the parties who drafted that Order," (ii) allegations "that a later order by [the bankruptcy court] could be interpreted as demonstrating that the Sale Order was not intended to, and did not, preclude the claims in the Complaint," and (iii) "pleading of the current impact of harm to Winget, Venco, and P.I.M. from compliance with the negative covenants included in the Guaranty Documents." However, none of these matters would lift the res judicata bar for Winget.

With respect to the first two matters, Winget argues that because of their potential impact on the interpretation of the Sale Order, they save Winget from res judicata. However, the cases that Winget cites for this proposition are contract cases that involve the interpretation of ambiguous and conflicting contractual

language. *See Greenberg,* 177 F.3d at 516 (discussing "internal inconsistencies in the policy language"); *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178-79 (6th Cir.1996) (concerning a dispute about an oral contract); *Klapp v. United Ins. Group. Agency, Inc.,* 468 Mich. 459, 663 N.W.2d 447, 452-53 (2003) (addressing terms that "irreconcilably conflict"). Furthermore, the district court held that the terms of the Sale Order were clear, and matters concerning the interpretation of court orders, such as sale orders, are questions of law. *Brady,* 101 F.3d at 1168.[1]

As for the third matter, these claims would not be new to an amended complaint; Winget raised them at the hearing on the motion to dismiss. Further, even taking Winget's claims as true—that it is experiencing present harm from restrictions imposed in the negative covenants—does not render these claims ripe for litigation. Any allegations of past wrongdoing are barred by res judicata, and present harm does not become justiciable until the Defendants attempt to collect the collateral.

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1. In reviewing a complaint in conjunction with a motion to dismiss, a district court is not required to accept a plaintiff's legal conclusions as true. *Murphy v. Sofamor Danek Group, Inc. (In re Sofamor Danek Group, Inc.),* 123 F.3d 394, 400 (6th Cir.1997). In order for this claim to survive a motion to dismiss if it were included in an amended complaint, the district court would have to accept Winget's legal conclusions as true. As it was under no obligation to do so, allowing Winget to file an amended complaint that hinged on the acceptance of a legal conclusion would be futile.

Because any amended complaint would have been futile, the district court did not abuse its discretion in not granting Winget leave to amend the Complaint.

B. The district court correctly struck Winget's amended complaint.

Winget argues that the district court erred in striking Winget's amended complaint, which Winget filed after the dismissal of the Complaint, without first seeking and obtaining leave of the court. Winget points to Fed.R.Civ.P. 15(a) for the proposition that it had a right to file an amended complaint without leave of court because, as of the Dismissal Order, the Defendants had not yet answered the Complaint. Winget also argues that the Dismissal Order was not a final order dismissing the Complaint; rather, Winget contends that the final order was not entered until the March 12, 2007 judgment. Winget also quotes our language in *Network Communications v. Michigan Bell Co.*, 906 F.2d 237, 238 (6th Cir.1990), that an "order dismissing a complaint is not a final order when it is possible for a plaintiff to file an amended complaint resurrecting the lawsuit."

However, Winget's citation here, as above, is misguided. In *Network Communications,* we held that while the plaintiff's original complaint was dismissed by summary judgment, the district court expressed specific intent to adjudicate a pending motion to amend the complaint. Such an expression by a district court would make it possible for a plaintiff to resurrect an otherwise expired lawsuit. There was no such expression on the

part of the district court here; rather, the district court made it clear that Winget's claims cannot be brought, as they were either barred by res judicata or were premature, and an amended complaint could not remedy these problems.

Winget does indeed correctly interpret Rule 15(a) to allow a plaintiff to file an amended complaint without leave of court when the defendant has not filed a responsive pleading. A motion to dismiss is not considered a responsive pleading under Rule 15(a). *See Ohio Cas. Ins. Co. v. Farmers Bank of Clay,* 178 F.2d 570, 573 (6th Cir.1949). Therefore, to the extent that the Defendants had not responded to the Complaint, Winget was free to file an amended complaint without leave of court. However, Winget's dilemma is not that the Defendants answered the Complaint, but that the district court entered a final judgment prior to Winget's filing its amended complaint.

We have interpreted Rule 15(a) to require a party to seek leave of court to amend its complaint once the district court has entered a final judgment. *Belle v. FBI,* 46 Fed.Appx. 326, 327 (6th Cir.2002) ("After judgment has been entered, a complaint may not be amended without leave of court.") (unpublished decision). Winget argues that the Dismissal Order was not a final order, and that the final order was entered on March 12, 2007, with the entry of the Judgment. As Winget did not file its amended complaint until the morning of March 12, 2007, before the entry of the judgment, the distinction is critical to its argument. Unfortunately, however,

Winget draws a distinction without a difference. With the Dismissal Order the district court clearly intended to dispose of the Complaint and Winget's case in their entirety. Even though the district court waited until March 12, 2007, to enter judgment in this case, the intention and effect of the Dismissal Order were a final judgment. As such, Winget was required to seek leave of court before filing an amended complaint. Because Winget did not do so, the district court did not err in dismissing Winget's amended complaint.

III. The district court employed the correct standard of review in examining the Complaint.

In reviewing a district court's dismissal of a case pursuant to Fed.R.Civ.P. 12(b), we, like the district court, take all well-pled allegations as true. *Greenberg*, 177 F.3d at 515. However, we, like the district court, "need not accept as true legal conclusions or unwarranted factual inferences." *Murphy v. Sofamor Danek Group, Inc. (In re Sofamor Danek Group, Inc.)*, 123 F.3d 394, 400 (6th Cir.1997). "[W]e conduct essentially the same analysis as the district court in that 'we take the plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then . . . dismissal is proper.' " *Greenberg*, 177 F.3d at 515 (quoting *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997)). The district court cannot grant a motion to dismiss based on its disbelief of the plaintiff's factual allegations. *Murphy*, 123 F.3d at 400. "[W]hen an allegation is capable of more than one inference, it must

be construed in the plaintiff's favor." *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir.1991).

After reviewing both the Complaint and the Dismissal Order, it is clear that the district court applied the correct standard of review, accepting as true Winget's allegations. The district court conducted a thorough analysis of Winget's claims and determined that even taking the allegations as true, the claims were either barred by res judicata or were premature. Such determinations did not rest on a disbelief of Winget's factual allegations or failure to accept them as true; rather, the determinations were the only possible legal conclusions the court could reach after accepting Winget's facts as pled. For instance, even accepting as true that the Defendants did engage in a scheme to devalue Deluxe and force Winget to accept the Defendants' terms, any litigation resulting from the scheme was barred by res judicata. Further, accepting as true Winget's allegation that the Defendant's actions devalued collateral, such claims are premature until the Defendants attempt to collect on that collateral. Under any analysis the Complaint could not have survived the motions to dismiss.

Winget argues that the district court erred in not drawing *all* inferences in its favor. Specifically, Winget contends that the district court should have construed the Sale Order so as not to bar Winget's claims, namely that the district court should have determined that the Sale Order was not a final order. Winget conducts a lengthy examination of the Sale Order to support its

argument, but to no avail. To hold that the Sale Order was not a final order would require a legal conclusion on the district court's part. Winget asks us to hold that the district court was required to accept Winget's legal conclusions as true, and we, like the district court, are not required to do so and do not err in a refusal. *See Murphy*, 123 F.3d at 400. Further, any interpretation of the language of the Sale Order is also a question of law, thereby necessarily requiring a legal conclusion on the part of the district court. *See Brady*, 101 F.3d at 1168. Because Winget was not entitled to have *all* of its allegations accepted as true, the district court did not err in refusing to accept as true Winget's legal conclusions.

Furthermore, it is clear that there is no set of facts that Winget could prove that would entitle it to relief. *See Greenberg*, 177 F.3d at 515. Regardless of what facts Winget might have pled and the district court accepted as true, Winget's claims were continuously barred by res judicata or premature for the reasons stated below.

IV. The district court acted without error in looking to the bankruptcy court orders when dismissing the Complaint.

When reviewing a motion to dismiss, a district court may not consider matters beyond the complaint. *Kostrzewa v. City of Troy*, 247 F.3d 633, 643 (6th Cir.2001) (citing 2 James Wm. Moore et al., Moore's Federal Practice § 12.34[2] (3d ed.2000)). If the district court considers evidence outside the complaint, it effectively

converts the motion to dismiss to a motion for summary judgment. *Id.* (citing Fed.R.Civ.P. 12(b)(6)); *see also Carter v. Stanton*, 405 U.S. 669, 671, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). The district court must then give the parties a " 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' " *Id.* (citing Fed.R.Civ.P. 12(b)(6)). Other circuits have held, however, that the district court may look to certain documents outside the complaint and such action does not result in a conversion of the motion to dismiss to a motion for summary judgment. The Third Circuit, in *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (3d Cir.1999), wrote, "To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." (citing numerous Third Circuit opinions for this proposition). "Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Id.*

Here, Winget argues that the district court improperly took judicial notice of facts in the bankruptcy court documents in dismissing the Complaint. Examining the Dismissal Order, it appears that the court looked to two bankruptcy court documents: the Sale Order and Winget's own objections to the Sale Order, which were eventually resolved. Although the district court quotes a paragraph from Winget's objection to the Sale Order, the district court did so not in a way that took judicial

notice of the facts in the paragraph, but rather in a way that took notice that Winget made an objection to the Sale Order based largely on the same claims in the Complaint, and then later withdrew that objection. The district court also points to the Sale Order only to say that it was a final order for res judicata purposes. In neither case did the district court act improperly or accord the bankruptcy court documents undue weight. Accordingly, the district court did not err in looking to the bankruptcy court documents when examining the Complaint.

V. The district court did not err in ignoring the independence of Winget's claims as a guarantor.

Winget asserts that even if the district court correctly interpreted the bankruptcy documents and applied the proper rules of construction under Fed.R.Civ.P. 12(b) in interpreting the Complaint, it erred by precluding Winget's claims as an independent guarantor. Winget cites *Wallace Hardware Co. v. Abrams,* 223 F.3d 382, 402 (6th Cir.2000), to support its argument that "this Circuit has recognized that the doctrine of *res judicata* (claim preclusion) does not preclude a guarantor's independent, defensive claims even if they arise out of the same facts and claims that the principal debtor and the creditor (here Defendants) resolved in a prior bankruptcy proceeding." Winget's reliance on *Wallace Hardware* for this proposition is misplaced, as it incorrectly cites the holding in that case.

Unlike the present case, *Wallace Hardware* involved a guaranty agreement that permitted "a creditor to compromise a claim against the principal debtor without discharging the guarantor's liability." *Id.* (noting that the courts will generally enforce such an agreement). The question before us in *Wallace Hardware* was whether the guarantor could assert breach-of-contract defenses ordinarily reserved for the principal in an action brought by the creditor when the principal was insolvent. *Id.* After noting that a discharge in bankruptcy does not ordinarily affect a guarantor's liability, we allowed the guarantor to set off the principal's defenses against the creditor due to the principal's insolvency. *Id.* The facts and issues of *Wallace Hardware* did not deal with res judicata and whether a final sale order in bankruptcy serves to bar any claims that a party to that proceeding could have brought at the time of sale. *Id.*

Alternatively, in direct contrast to Winget's argument, we have held that "[r]es judicata bars not only the parties to an earlier bankruptcy proceeding from later bringing suits which should have been brought in the context of the proceeding, but also those in privity with the parties." *Browning*, 283 F.3d at 772 (citing *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.* 973 F.2d 474, 481 (6th Cir.1992)). "Privity in this sense means a successor in interest to the party. . . ." *Id.* Winget's sole opportunity to bring its claims was prior to the bankruptcy court's entry of the Sale Order. Winget cannot now bypass the res judicata bar and its failure to bring timely suit by arguing that its claims are independent as a guarantor and

permissible without citing to any authority for such an assertion. Consequently, the district court correctly ignored the alleged independence of Winget's claims as a guarantor.

VI. The district court correctly held that Winget's claims were barred by res judicata.

The district court held that "[o]verall, Winget's claims are barred by res judicata." In doing so, the court noted that Winget's allegations of the Defendants' wrongdoing could have been raised in the bankruptcy court, "whether [the allegations] took place prior to the bankruptcy filings or during the bankruptcy proceedings." The district court correctly outlined the elements of res judicata. We have held that,

> [A] claim is barred by the res judicata effect of prior litigation if all of the following elements are present: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action."

Browning, 283 F.3d at 771-72 (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir.1997)).

Regarding the first element, we have never explicitly held that a bankruptcy court's final sale order is a final decision on the merits for res judicata purposes. *See Wells v. TCF Nat'l Bank (In re Hi Tech Fleet Serv., Inc.)*, 339 B.R. 428, 432 (Bankr.E.D.Mich.2006) (noting that the issue of whether a bankruptcy court's sale order is a final order "appears to be [an issue] of first impression in the Sixth Circuit"); *see also Vickers v. IRS (In re Scott James Fortier)*, 161 Fed.Appx. 514, 517 (6th Cir.2005) (unpublished decision) (holding that in that case the bankruptcy court's sale order was a final order for res judicata purposes). Other circuits have held that bankruptcy courts' sale orders are final orders for res judicata purposes. *See Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 742 (5th Cir.1993) ("Our precedent clearly establishes that bankruptcy court orders authorizing the sale of part of the estate or confirming such sale are final judgments on the merits for *res judicata* purposes." (italics in original)); *Met-L-Wood Corp. v. Gekas (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1016 (7th Cir.1988) (holding that bankruptcy court's order confirming judicial sale or a debtor's estate was a final, appealable order); *In re Sax*, 796 F.2d 994, 996 (7th Cir.1986) (holding that orders approving the sale of debtor's property are final decisions).

We have also held that finality "is considered in a more pragmatic and less technical way in bankruptcy cases than in other situations." *Lindsey v. O'Brien, Tanksi, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning)*, 86 F.3d 482, 488 (6th Cir.1996) (quoting *In re Cottrell*, 876 F.2d 540, 541-42

(6th Cir.1989)). "Therefore, where an order in a bankruptcy case 'finally dispose[s] of discrete disputes within the larger case,' it may be appealed immediately." *Id.* (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir.1983)); *see also Morton v. Morton (In re Morton)*, 298 B.R. 301, 303 (6th Cir. BAP 2003) (noting that a bankruptcy court's order overruling a Chapter 13 debtor's objection to claims was a final order because it ended litigation on the merits and left nothing for the court but the execution of judgment). Finally, we have also held that "[a]s a general rule, the '[c]onfirmation of a plan of reorganization constitutes a final judgment in bankruptcy proceedings.' " *Browning*, 283 F.3d at 772 (quoting *Sanders Confectionery*, 973 F.2d at 480). "Such confirmation by a bankruptcy court 'has the effect of a judgment by the district court and res judicata principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings.' " *Id.* (quoting *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 463 (6th Cir.1991)).

We join other circuits in holding that a bankruptcy court's sale order is a final order for res judicata purposes, not only because it is in line with our holdings that an order confirming a reorganization is a final order, but also because it is in line with the policy behind res judicata. As the United States Supreme Court wrote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981):

> This Court has long recognized that "[p]ublic policy dictates that there be an end of

> litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts. . . ."

(internal citations omitted). A sale order signals an end to litigation in a bankruptcy proceeding; with the execution of the sale order the debtor's assets are judicially sold and no further litigation can be brought regarding those assets without forcing the court to undo the sale, an action of the very kind res judicata seeks to prohibit. If sale orders were not final, parties could continue to litigate issues regarding the assets long after their sale, which is certainly an outcome worth prohibiting. As such, we hold that a sale order is a final order for res judicata purposes.

Because a bankruptcy court's sale order is a final order for res judicata purposes, the first element of res judicata is met here. *See Browning,* 283 F.3d at 771-72 (quoting *Bittinger v. Tecumseh Prods. Co.,* 123 F.3d 877, 880 (6th Cir.1997)). On March 19, 2005, the bankruptcy court issued the Sale Order, which authorized the sale of substantially all of the assets of both Venture and Deluxe. This Sale Order was a final order.

Winget asserts that we should not construe the Sale Order as a final order because its claims "do not attack the necessary and appropriate findings of the Sale Order." However, Winget fallaciously argues that its claims determine the characterization of the Sale Order; they do not. Rather, the Sale Order is independently characterized as final depending on whether it is intended to dispose of litigation. *See In re Dow Corning*, 86 F.3d at 488. Here, the bankruptcy court's intention was to dispose of the case, and the district court correctly interpreted the Sale Order as a final order for res judicata purposes.

The second element of res judicata is also met here, as there is subsequent action between the same parties or those in privity with the parties to the original action. In the present case, the original action was the Bankruptcy Proceeding. Among the original parties to that proceeding, as identified in the Sale Order, were Venture, Deluxe, Winget, and the Lenders. Winget does not contest that the parties here were parties to the Bankruptcy Proceedings.

The third element of res judicata is satisfied because Winget could have, and indeed should have, brought its action during the Bankruptcy Proceeding. As the district court correctly noted, claims are considered related to a bankruptcy proceeding if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Browning*, 283 F.3d at 773 (quoting *Sanders Confectionery*, 973 F.2d at 482.) "Stated another way, a

claim is 'related to' the bankruptcy proceeding if it would have affected the debtor's rights or liabilities." *Id.* (citing *In re Dow Corning Corp.*, 86 F.3d at 489). As Winget's claims attack the Defendants' pre-bankruptcy actions and allege that the Defendants deliberately devalued the assets of Deluxe prior to its bankruptcy proceeding and subsequent sale, those claims would have had a direct effect on the assets in the bankruptcy proceeding. For example, in the Complaint Winget asks for a declaratory judgment that would require the court to value Deluxe's assets at their pre-bankruptcy value. As those assets have largely been sold, a request for such an order could only have been brought prior to the sale of those assets.

Although Winget argued before the district court that it was unaware of all of the facts needed to bring the claims before the bankruptcy court at the time of that proceeding, such argument is belied by the fact that the claims Winget brings in the Complaint are largely identical to the arguments Winget made in its objection to the Sale Order, which it later withdrew. For instance, in its objection Winget argued:

> Mr. Winget believes he has meritorious claims against the Senior Lenders who . . . have engaged in a course of unlawful conduct resulting in damages to the Debtor's business, in essence, a precipitous decline in the value of the Venture Debtors' and Deluxe Debtors' businesses and assets and a corresponding devaluation of Mr. Winget's interests.

Further, all of the actions that Winget alleged in the Complaint took place before the bankruptcy proceeding. In fact, not a single factual allegation in the Complaint occurred after May 25, 2004.

Winget also asks us to read the third element of res judicata broadly, arguing that the element does not require parties to bring any claim that could be litigated at the earlier proceeding at that time. Winget cites to language from a Delaware bankruptcy case to support its argument, noting that the fact that a "party may have an interest in a motion does not require that party to raise all interests or claims that it has in the bankruptcy case generally at the time the motion is heard. . . . To apply res judicata so broadly would bring bankruptcy cases to a halt." *Philip Servs. Corp. v. Luntz (In re Philip Servs. Corp.)*, 267 B.R. 62, 68 (Bankr.D.Del.2001). Indeed, on this point Winget is correct; res judicata makes no such requirement. Rather, it bars a party from bringing any claim that *should* have been litigated in the earlier proceeding. "[W]hat is important is not whether a particular claim is compulsory, but whether the claim should have been considered during the prior action." *Sanders Confectionery Prods.*, 973 F.2d at 484. But Winget's claims were not akin to those that might be generally raised in a motion before a bankruptcy court. Instead, Winget's claims attacked the heart of the Sale Order: the value of the assets. Those claims should only have been brought before the bankruptcy court issued the Sale Order.

The final element of res judicata requires that there be an "identity of claims," which is satisfied if " 'the claims arose out of the same transaction or series of transactions," or if "the claims arose out of the same core of operative facts.' " *Browning*, 283 F.3d at 773-74 (quoting *Micro-Time Mgmt. Sys., Inc. v. Allard & Fish, P.C. (In re Micro-Time Mgmt. Sys., Inc.)*, 983 F.2d 1067 (6th Cir.1993)). Winget urges us to take a narrow approach to this element and hold that its claims did not arise out of the same series of transactions or operative facts as the Bankruptcy Proceeding because the Sale Order did not mention the Guaranty Documents, and because the Sale Order did not reference the same time period as the allegations in the Complaint. Specifically, Winget asks us to adopt tests that are used in the Third and Eleventh Circuits, which narrowly define "identity" when res judicata is used in conjunction with bankruptcy proceedings. *See Eastern Minerals & Chem. Co. v. Mahan*, 225 F.3d 330, 337-38 (3d Cir.2000) (holding that "a claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have them brought at the same time in the bankruptcy forum"); *Eastman Kodak Co. v. Atlanta Retail, Inc. (In re Atlanta Retail, Inc.)*, 456 F.3d 1277, 1280 (11th Cir.2006) (holding that an identity of claims only exists if "the resolution of [the second] claim explicitly [was] part of the bankruptcy plan"). Adoption of such tests would not, however, be in line with current res judicata jurisprudence in this circuit, which has adopted the traditional view of identity as a res judicata element.

We are not required, as Winget requests, to parse the Sale Order to determine whether the final element of res judicata is met. Looking at the Complaint, it is clear that the factual allegations contained therein pertain not just to the Sale Order, but to the larger transactions and facts of Winget and the Defendants' continuous dealings. These were the same transactions and facts on which Winget based its objection to the Sale Order. The transactions and facts that form the basis for Winget's allegations are the same transactions and facts that led to the Bankruptcy Proceeding. As such, Winget's argument fails and the fourth, and final, element of res judicata is met here.

In sum, the district court did not err in holding that Winget's claims were barred by res judicata.

VII. The district court correctly held that Winget's claims were not reserved in the Sale Order, and thus should have been brought during the Bankruptcy Proceeding.

In addition to its arguments as described above regarding the finality of the Sale Order, Winget alternatively argues that its claims are not barred by res judicata because it preserved its claims in the Sale Order. Specifically, Winget maintains that Paragraph 39 of the Sale Order preserved its claims. Paragraph 39 reads:

> Nothing in the Sale Order . . . shall limit or impair any claim . . . that Mr. Larry J. Winget

> or any entity owned or controlled by Larry J. Winget (other than the Debtors) . . . have or may have against [JP Morgan] or [Black Diamond] . . . relating to their acts, conduct, omissions or relationship, contractual or otherwise, as to the Winget Entities. . . .

The district court correctly held that this language was unambiguous, and reserved claims against the Defendants for their actions in relation to Winget's companies that were not parties to the Bankruptcy Proceeding. The language of Paragraph 39 specifically said that claims relating to "the Debtors," which were Venture and Deluxe, were not reserved.

Language reserving claims must be precise and identify the claims sought to be retained. *Browning*, 283 F.3d at 774-75. Here, the language meets that requirement and clearly reserves only those claims which pertain to Winget's other companies. Winget urges us to engage in an elaborate reading of Paragraph 39; we decline to do so. Winget's argument that it successfully reserved its present claims is contrary to the language of Paragraph 39, and to grant Winget a broad, rather than honed, reading of the paragraph would be contrary to our jurisprudence.

VIII. The district court correctly held that Winget's claims related to any future repossession of collateral were premature.

The district court correctly held that to the extent that Winget's claims challenge the Defendants' compliance with the Last Resort Conditions, such claims are premature. These claims are premature because the Defendants have not yet enforced the Guaranty Documents; when they do so, Winget may then bring a claim that the Defendants' actions violated the Last Resort Conditions. Any attempt to bring the claim before the Defendants attempt to possess the collateral is premature. " '[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Cooley v. Granholm*, 291 F.3d 880, 883-84 (6th Cir.2002) (quoting *Texas v. United States*, 523 U.S. 296, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). As a rule, we do not allow litigation on premature claims to ensure that courts litigate "only existing, substantial controversies, not hypothetical questions or possibilities." *City Commc'ns, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir.1989). Because Winget's claims regard the valuation of collateral the Defendants have not yet sought, those claims are only hypothetical questions or possibilities, and the district court correctly dismissed those claims.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER GRANTING THE AGENT'S (JP MORGAN) MOTION TO DISMISS AND DENYING THE AGENT'S MOTION TO STRIKE JURY DEMAND AS MOOT AND GRANTING BLACK DIAMOND'S MOTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED MARCH 7, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-13490

HON. AVERN COHN

LARRY WINGET and the
LARRY WINGET LIVING TRUST,

Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN CHASE & CO., BLACK DIAMOND COMMERCIAL FINANCE, LLC, BLACK DIAMOND CAPITAL MANAGEMENT LIVING TRUST,

Defendants.

Appendix B

MEMORANDUM AND ORDER GRANTING THE AGENT'S (JP MORGAN) MOTION TO DISMISS AND DENYING THE AGENT'S MOTION TO STRIKE JURY DEMAND AS MOOT AND GRANTING BLACK DIAMOND'S MOTION TO DISMISS AND DISMISSING CASE

I. Introduction

This is a commercial finance dispute which has spawned two cases. In the first case, **JPMorgan Chase Bank, N.A.,** the Administrative Agent (Agent) for a group of lenders (Lenders) that extended credit to **Venture Holdings Company, LLC** (Venture) under a Credit Agreement,[1] is suing **Larry Winget** and the **Larry Winget Living Trust** (Winget) seeking (1) specific performance and declaratory relief related to a written guaranty agreement (Winget Guarantee) in favor of Agent in connection with the indebtedness of Venture and (2) obtain a declaratory judgment as to its rights under two of the several Pledge Agreements dated October 21, 2002 also executed by Winget in favor of the Agent. *JP Morgan v. Winget,* 05-74141 (the 2005 case).

As will be explained, on August 9, 2006, Winget filed a complaint against the Agent, Black Diamond Commercial Finance, LLC, and Black Diamond Capital

1. Bank One, NA, was the Administrative Agent for the lenders. It merged with JP Morgan in 2004. JP Morgan succeeded to Bank One, NA's rights.

Management, LLC (collectively, Black Diamond) (the 2006 case). The complaint generally asserts the same claims that previously appeared as amended counterclaims in the 2005 case They are:

Count I Declaratory Relief-Breach of Contract (regarding the Guaranty and Pledge Agreements)

Count II	Declaratory Relief-Condition Subsequent
Count III	Impairment of Collateral
Count IV	Oppression of Shareholder's Interests

Before the Court are the following motions in the 2006 case:

- The Agent's Motion to Dismiss
- Black Diamond's Motion to Dismiss
- The Agent's Motion to Strike Jury Demand

For the reasons that follow, the Agent and Black Diamond's motions to dismiss are GRANTED. The Agent's Motion to Strike Jury Demand is DENIED AS MOOT. This case is DISMISSED.

Appendix B

II. Background

A. General

Venture was a parent holding company for various subsidiaries (the Venture entities). Together with Deluxe Pattern Corporation and a group of affiliated companies (the Deluxe entities), the Venture entities became a worldwide supplier of plastic automotive components. Larry Winget, either directly or through a trust, owned 100% of the equity of the Venture entities and the Deluxe entities. Winget also owns other entities, including P.I.M. Management Company (PIM) and Venco # 1, LLC (Venco).

The Agent advanced credit to Venture under the terms of a Credit Agreement dated May 27, 1999. The Credit Agreement was amended eight times, most recently on October 22, 2002 (the Eighth Amendment). The Eighth Amendment was executed at a time where the financial condition of Venture and its affiliates was rapidly deteriorating. Under the Eighth Amendment, Winget executed the Winget Guaranty and the Pledge Agreements. PIM and Venco also executed Guaranties (the PIM Guarantee and the Venco Guaranty) and Pledge Agreements that were similar, but not identical, to the Winget Guaranty.

Section 5.2 of the Pledge Agreements, which is the major provision at issue, provides:

> . . . the Agent shall not exercise any rights or remedies under [the] Pledge Agreement

> until all reasonable efforts shall have been made by it to collect the Obligations form other collateral held by the Agent ..., it being intended that the collateral provided by [the] Pledge Agreement shall be realized upon by the Agent only as a last resort.

On March 28, 2003, the Venture entities, under the direction of Winget, filed for a Chapter 11 reorganization. Bank One, and subsequently Black Diamond Commercial Finance, LLC provided debtor in possession (DIP) financing.

On May 21, 2004, the Agent exercised its rights to vote proxies for the Deluxe Entities. Specifically, the Agent voted to elect new directors and managers. On May 24, 2004, the Deluxe Entities filed Chapter 11 petitions.

Plans to reorganize the Venture Entities and the Deluxe Entities were pursued, but ultimately were not successful because the amount of "exit financing" necessary to support the emerging companies was greater than the amount Winget would consent. Accordingly, the assets of the Venture Entities and the Deluxe Entities were sold at auction.

On April 19, 2005, the bankruptcy court entered a Sale Order approving the sale of substantially all of the assets of the Venture and Deluxe Entities to the highest bidder, an entity known as New Venture Holdings, LLC. The sale was consummated in May 2005. Following the

sale, a deficiency of approximately $375 million remained on the obligations under the Credit Agreements.

B. The 2005 Case

On October 28, 2005, the Agent filed a two count complaint for (1) specific performance and (2) declaratory judgment. Under Count I, the Agent sought to inspect Winget's financial records relating to Venture and affiliated companies, particularly PIM and Venco, pursuant to Section 11 of the Guaranty with Winget. The Agent essentially sought to monitor the value of its collateral under the Guaranty. Under Count II, the Agent asked the Court to declare the rights of the parties under two Pledge Agreements between the Agent and Winget as to PIM and Venco. The Agent asked for a determination of whether PIM and Venco are collateral under the Credit Agreement.

Winget answered the complaint and asserted several affirmative defenses and also filed a counterclaim (which was later amended) naming the Agent, Bank One Corporation, and Bank One N.A. as defendants and also requesting a jury demand. The affirmative defenses were as follows:

1. Plaintiff's action was barred under the terms of the Guarantee due to its first material breach of the related Pledge Agreements

2. Plaintiff materially breached its duty to act reasonably to protect the collateral in its possession so as to not impair its value, and in doing so, acted willfully, recklessly or intentionally

3. Winget was excused from performance under the Guarantee due to Plaintiff's material breach of the related Pledge Agreements

4. Winget, PIM and Venco were entitled to setoff in an amount equal to the damages caused by the actions set forth in Paragraphs 1 through 5 above

5. Plaintiff's claims were barred based on unclean hands

6. Plaintiff's claims were barred by lack of good faith

7. Winget reserved the right to assert additional affirmative defenses as they became known through discovery

The Agent filed a motion to dismiss the amended counterclaim and a motion to strike the jury demand filed in connection with the amended counterclaim. On June 29, 2006, the Court entered an order dismissing the amended counterclaim without prejudice and directing Winget to file a new complaint against the

Agent and other third parties. Winget complied by filing the second case, the 2006 case, discussed further below.

The Agent then filed a motion for motion for judgment on the pleadings to (1) strike Winget's affirmative defenses as they relate to both counts of the complaint and (2) for judgment on count I of the complaint. The motion was heard on September 27, 2006 at which time the Court stated that the Agents were entitled to summary judgment on Count I, Count II would be dismissed without prejudice and Winget's affirmative defenses as related to Count II and in particular as to their counter-claims, would be determined in the 2006 case. The Court issued a Memorandum on October 3, 2006 further detailing its reasons. On December 15, 2006, the Court entered an Amended Order with respect to the Agent's complaint which ordered Winget to comply with the audit request in Count I and dismissed Count II. As to Count II, the Court stated:

> For the reasons explained in the Court's October 3, 2006 Memorandum, Defendants' affirmative defenses, to the extent they are interpreted to challenge whether Plaintiff has complied with § 5.2 of the Pledge Agreements, shall not be litigated in this case but instead shall be litigated in [the Winget case], or in response to Plaintiff's efforts to foreclose on the Pledge Agreements.

This order effectively ended the case. Winget appealed. The appeal is pending in the Court of Appeals for the Sixth Circuit.

C. The 2006 Case

On August 9, 2006, Winget filed the complaint in a second case as directed. The overall thrust of the complaint, as explained by Winget, is that

> The Consortium [the Agent, Black Diamond and others] therefore launched to coerce Winget to contribute Venco and PIM, which were and are worth over $250 million, and thereby increase their collateral pool at a time when Venture was in serious financial trouble. Defendant Black Diamond was a key participant in the Consortium because it was the "DIP Lender" to Venture and owed substantial amounts of the debt owed by Venture under the Credit Agreement.
>
> . . .
>
> . . . the acts and omissions of the Consortium and of the Agent as its Agent in failing to sell the Venture and Deluxe companies for a reasonable sum in a reasonable time, thereby exposing Winget to liability under the Guaranty Documents . . . The Complaint does not attack the sale of the assets of the Venture and Deluxe debtors in

> the Bankruptcy proceedings to an entity controlled by the Consortium or any aspect of the sale. To the contrary, Winget's claim is that the sale approved by the Bankruptcy Court was caused by the Consortium's abandoning its duty to Winget as a Guarantor in instead pursue gaining control of PIM and Venco.

As the Agent explains it:

> The gravamen of Winget's claims is that the sale of Venture's and Deluxe's assets did not generate sufficient funds to cover Venture's outstanding obligations under the Credit Agreement—leaving Winget, PIM, and Venco "wrongfully exposed" to liability for the remaining deficiency under their Guaranties—because the value of the Deluxe Entities had decreased as a result of the Agent's and Black Diamond's actions.

As Black Diamond explains it:

> Winget alleges that [the Agent], as an administrative agent to a Consortium of lenders under a Credit Agreement dated May 27, 1999, as well as Black Diamond, as a [DIP lender] and limited participant in the Consortium, engaged in a purported "Consortium Scheme" that was intended to destroy the value of a group of entities owned

> by Winget called the Venture Companies and the Deluxe Companies. The alleged purposes of this "scheme" was the deliberately "compromise" to value of their assets of Venture and Deluxe so that the Consortium could "appropriate" collateral as "part of a favorable foreclosure sale" (and thereby not only obtain assets of Venture and Deluxe but also give the Consortium a right to foreclosure on additional collateral owned by Winget).

The alleged "scheme" as detailed in Winget's claims, can be summarized as follows:

In Count I, entitled Declaratory Relief-Breach of Contract, Winget alleges that in pursuing the Consortium scheme, the Agent and Black Diamond "failed to make 'all reasonable efforts' to satisfy the obligations owed to the Consortium from collateral that included the Venture Companies and the Deluxe Companies, as provided in the Guaranty Documents." Compl. at ¶ 54. As a result, Winget is "wrongfully exposed to liability and loss under the Guaranty Documents." *Id.* at ¶ 56. Wiget requests a declaration that the Agent and Black Diamond breached the Guaranty Documents by failing to use all "reasonable efforts" to collect amounts owed to the Consortium from other collateral, that the Guaranty Documents are not enforceable, and that the Agent and Black Diamond acted maliciously.

In Count II, entitled Declaratory Relief-Condition Subsequent, Winget alleged that "in attempting to

enforce the Guaranty Documents" the Agent asserts that it can use self help in exercising its rights without prior notice to Winget. Winget wants a declaration that the Guaranty Documents "have an implied duty to provide reasonable notice to WInget before exercising any self help remedies."

In Count III, entitled Impairment of Collateral, Winget alleges that the Agent and the Consortium did not exercise reasonable care in the custody and/or preservation of collateral pledged to the Agent for the Consortium.

In Count IV, entitled Oppression of Shareholder's Interests, Winget alleges that the Agent, Black Diamond, and the Consortium, engaged in a course of conduct that was willfully unfair and oppressive to Winget's interest as a shareholder in the Deluxe Companies. He also alleges that the Agent and Black Diamond aided and abetted in the actions of two individuals regarding breaches of fiduciary duty.

III. Legal Standard

When analyzing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must take a plaintiff's well-pleaded allegations as true. *Miree v. DeKalb County,* 433 U.S. 25, 27 n. 1, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). "[W]hen an allegation is capable of more than one inference, it must be construed in the plaintiff's favor." *Sinay v. Lawson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir.1991). "A court may dismiss a complaint

only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

IV. Analysis

A. Overview

Both the Agent and Black Diamond have filed motions to dismiss. Both motions raise a host of arguments in support. Specifically, the Agent argues that: (1) the complaint must be dismissed in its entirety because Winget's claims are barred by *res judicata,* (2) the complaint must be dismissed in its entirety because all of the asserted claims were waived under the Guaranties, Pledge Agreements, and Settlement Agreements between the parties, (3) Count I must be dismissed because it fails to state a claim for breach of contract, (4) Count II must be dismissed because the requested declaratory relief, an amendment of the terms of a clear and unambiguous contracts, is unavailable as a matter of law, (5) Count III must be dismissed because the claim is waived by Winget under the terms of the Guaranties, Pledge Agreements and Settlement Agreements, (6) Count IV must be dismissed because it fails to state a claim for shareholder oppression under M.C.L. § 450.1489 or any other claim upon which relief can be granted, (7) the complaint must be dismissed in its entirety as to JP Morgan Chase & Co. because it is not a proper party.

Black Diamond argues that (1) Counts I, III and IV are barred by *res judicata*, (2) Black Diamond must be dismissed from Count I because it is not a party to the contractual duties Winget asserts were breached, (3) Black Diamond is not named in Count II, regardless; Black Diamond is not a party to the contractual rights and duties at issue, (4) Count III fails to state a claim against Black Diamond because under Michigan's UCC, any legal obligations to preserve collateral rest with the Agent, (5) Count IV fails as a matter of law for several reasons, including that the claim can only be brought as a derivative claims and is barred by the statute of limitations.

B. Is the 2006 Case Premature?

Winget has responded to all of the Agent and Black Diamond's complex legal arguments. Notably, however, in his response to Black Diamond's motion, he repeatedly characterizes its claims in this case as "solely defensive claims." Winget also says that he "seeks no affirmative relief beyond the right of set-off to any claim secured the Consortium." This response raises a real problem with the Complaint, as both Black Diamond and the Agent picked up on and argued in their reply briefs. That is, is the 2006 case premature?

As Black Diamond points out, as of yet there is no claim seeking to recover on the Guaranties or the Pledge Agreements against Winget, so there is nothing for him to defensively set off. At most, Winget is seeking a declaratory ruling that if a suit is brought against him

attempting to recover under the Guaranties and Pledge Agreements, his purely defensive allegations should work to fully or partially set-off such recovery.

The Agent similarly states that:

> In its October 3, 2006 Memorandum Opinion [in the Agent Case] this Court granted judgment to [the Agent] for enforcement of its audit rights under the "Winget Guaranty." The Court also advised that it is dismissing the Agent's request for declaratory judgment regarding the "all reasonable efforts" clause § 5.2 in the PIM and Venco Pledge Agreements. Based on the Court's reasoning in granting the Agent's audit rights, Plaintiffs now understand that the Winget Guaranty is in effect. To save their claims from the broad waiver provision in that Guaranty, Plaintiffs now describe those claims as "solely defensive in nature."
>
> With the dismissal of the Agent's declaratory judgment claim, however, there is no action pending in which the Agent seeks an adjudication regarding the Guaranty or the Pledge Agreements. Consequently, there is no claim pending against which Plaintiffs can raise their "purely defensive claims." Their claims in the 2006 Case therefore are premature and should be dismissed.

Agent's reply at p. 1.

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Notwithstanding the Court's directive to file a new complaint, at that time it did not fully understand the parameters of Winget's claims or how they relate to the events of Venture's bankruptcy. One thing that has not changed is the fact that the Agent has not yet taken any action to collect on the Guaranties or the Pledge Agreements. This does raise a real question of whether the 2006 Case is premature. To the extent that Winget wants to challenge the "reasonable efforts" provision of the Pledge Agreements, the Agent must first take some action. It has not. When the Agent does, which is likely given the large deficiency, the matter can be properly litigated. To make any ruling on whether the Agent acted reasonably before the Agent seeks affirmative relief would be an advisory decision and the Court would be operating in a vacuum.

What is also problematic for Winget, now that the complaint fleshes out Winget's claims against the Agent and Black Diamond, is whether the claims are barred by *res judicata* because they encompass events which took place before the Sale Order was entered in the bankruptcy court and involve issues that could have been raised in the bankruptcy court. At the hearing on the motions, the Court questioned counsel for Winget regarding the time frame surrounding his claims and invited counsel to file a supplemental paper detailing the timeline of Agent and Black Diamond's alleged wrongful conduct as extracted from the complaint. On March 2, 2007, Winget filed a paper styled "Plaintiffs' Annotated Complaint Extracts RE: Defendants' Wrongful Action Before May 24, 2004," to which the

Agent responded. A review of Winget's supplemental filing, as will be explained, makes clear that his claims against the Agent and Black Diamond relevant to their actions with respect to the Venture Entities and the Deluxe Entities are barred by *res judicata.*

C. *Res Judicata*

As eluded to above, on April 19, 2005, the Bankruptcy Court entered a Sale Order approving of the sale of substantially all of the assets of the Venture Entities and the Deluxe Entities; it was consummated in May 2005. Both the Agent and Black Diamond argue that Winget's claims are barred by *res judicata,* particularly by the Sale Order entered by the Bankruptcy Court.

According to the Sixth Circuit, the doctrine of *res judicata* "promote[s] the finality of judgments, which in turn increases certainty, discourages multiple litigation and conserves judicial resources." *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir.1992). *See Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). *Res judicata* should not be confused with collateral estoppel or issue preclusion. *Res judicata,* or claim preclusion, has four elements:

1. A final decision on the merits in the first action by a court of competent jurisdiction;

2. The second action involves the same parties, or their privies, as the first;

3. The second action raises an issue actually litigated or which should have been litigated in the first action;

4. An identity of the causes of action

King v. South Cent. Bell Tel. & Tel. Co., 790 F.2d 524 (6th Cir.1986); *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224 (6th Cir.1981).

First, the Sale Order qualifies as a final judgment for purposes of *res judicata*. *In re Hi Tech Fleet Serv., Inc.*, 339 B.R. 428, 432-33 (Bankr.E.D.Mich.2006) (holding that although the Sixth Circuit has not addressed the issue, other circuits have found that a sale order has a *res judicata* effect even though the order does not close the bankruptcy).

Second, it is clear that the parties in the 2006 case were parties in the bankruptcy proceedings. Winget pursued his interest both as sole owner of the debtors and as guarantor of Venture's debt. *See Browing v. Levy*, 283 F.3d 761, 774-77 (6th Cir.2002) (shareholder-creditors are considered participants in bankruptcy proceeding for purposes of *res judicata); Sanders Confectionary Prods., Inc. v. Heller Fin. Inc.*, 973 F.2d 474, 480-81 (6th Cir.1992).

Third, the "defensive claims" that Winget now raises should have been litigated in the bankruptcy court. "A matter is related to a bankruptcy case if 'the outcome of that proceeding could conceivably have any effect on

the estate begin administered in bankruptcy.' " *Sanders*, 973 F.2d at 482 (citations omitted). Claims should have been brought in a bankruptcy proceeding where successful adjudication "would have affected the bankruptcy estate." *Id.* at 483. Although Winget suggests that he did not know all the facts needed to bring the claims before the bankruptcy court, this assertion is belied by the allegations in the complaint and the record. Winget claims that the sale of the Venture Entities and the Deluxe Ertities, which was done at the behest of the Agent and other creditors, did not generate sufficient funds to cover Venture's outstanding obligations, thereby leaving Winget, Venco, and PIM "wrongfully exposed" to liability under the Guaranties because the value of the Deluxe Entities had decreased as a result of the Agent and Black Diamond's actions. As the Agent points out, all of these alleged wrongful actions took place before the Sale Order in April 2005. Indeed, the complaint alleges that the "final components of the Consortium Scheme" were implemented in May 2004 and the drop in the value of the Deluxe Entities is alleged to have occurred in the months thereafter. *See* Complaint at ¶ 39, 48. Winget expressed this very concern to the bankruptcy court, as follows:

> Mr. Winget believes he has meritorious claims against the Senior Lenders, who, led by Bank One, have engaged in a course of unlawful conduct resulting in damages to the Debtors' business; in essence, a precipitous decline in the value of the Venture Debtors'

> and Deluxe Debtors' businesses and assets and a corresponding devaluation of Mr. Winget's interests. That conduct has also increased the risk that Bank One would call upon Mr. Winget's guaranty and exercise remedies against the additional collateral provided by Mr. Winget for that guaranty. As a result, Mr. Winget has claims against the Senior Lenders and Bank One for either money damages or rescission with regard to the collateral provided and liens granted to Bank One pursuant to the 8th Amendment.

Objection of Larry Winget and the Larry J. Winget Living Trust to Venture Debtors' and Deluxe Debtors' Motion for Order Approving, Among Other Things, the Sale of Substantially All of the Debtors' and Deluxe Debtors' Assets, filed in bankruptcy case no. 03-48939. Winget, however, later resolved his objections and agreed that the sale could go forward. Winget did not challenge or appeal the Sale Order.

In the supplemental paper, Winget extracts other paragraphs of the complaint which contain allegations of wrongful conduct by the Agent and Black Diamond, as members of the "consortium" which go back as far as October 2003. *See* Complaint at ¶¶ 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43. However, as the Agent points out, all of the allegations relating to events prior to the May 24, 2004 filing of the Deluxe Entities bankruptcy petition

involve matters which were under the aegis of the bankruptcy court. As the Agent states:

> . . . Winget had already litigated the Contribution Agreement at length and had ample opportunity during the Venture and Deluxe bankruptcy proceedings to litigate (a) the financing of the Venture companies' litigation, (b) the decision not to accept a supposedly higher-yieling Yucaipa proposal from the Venture and Deluxe companies, (c) the Agent's exercise of its proxies, and (d) Deluxe's voluntary bankruptcy.

"The final element of *res judicata*-that there be an 'identity of claims'-is satisfied if 'the claims arose out of the same transaction or series of transactions, or whether the claims arose out of the same core of operative facts.' " *Browning,* 283 F.3d at 773-74. The defensive claims are identical to those he could have asserted in the bankruptcy proceedings. As explained above, the defensive claims are based on events which took place prior to and during the bankruptcy proceedings. Notably, prior to entry of the Sale Order, Winget filed a motion in the bankruptcy court seeking the appointment of a Chapter 11 trustee for the estates of the Deluxe Entities. He argues that the "Deluxe Debtors' current management is being directed by the lender group" and that the CEO of the Deluxe Debtors "pillaged the Deluxe Debtors" and that this "illustrated quite prominently that [the CEO] is acting at the behest of Bank One and the Pre-Petition Lenders rather than

as fiduciary to the Deluxe Debtors." This motion, according to Black Diamond, was withdrawn by Winget before adjudication. Winget does not say otherwise.

Overall, Winget's claims are barred by *res judicata*. All of the allegations of wrongdoing by the Agent and Black Diamond, whether they took place prior to the bankruptcy filings or during the bankruptcy proceedings, could have been raised in the bankruptcy court. As noted above, Winget raised some objections in the bankruptcy court, but chose to withdraw them and let the Sale Order go forward. Winget cannot now challenge actions which had he challenged earlier and been successful, could have affected the outcome of the bankruptcy proceedings.

Moreover, Winget's claims were not reserved. Language reserving claims must be precise, identifying the particular claims to be retained. *Browning*, 283 F.3d at 774-75. Here, Winget did reserve some claims. The Sale Order contains the following reservation clause:

> Nothing in the Sale Order . . . shall limit or impair any claim . . . that Mr. Larry J. Winget or any entity owned or controlled by Larry J. Winget (other than the Debtors) (collectively, the "Winget Entities") have or may have against [the Agent] or [Black Diamond . . . *relating to their acts, omissions or relationship, contractual or otherwise, as to the Winget Entities.*

Sale Order at ¶ 39 (emphasis added).

This language is clear. Winget, PIM, and Venco reserved claims relating to the Agent and Black Diamond's conduct as to the Winget Entities. The Winget Entities are defined as all Winget owned or controlled entities *other than the Debtors* [Deluxe and Venture]. Thus, claims relating to the Agent and Black Diamond's actions as to the Debtors were not reserved. That is precisely the claims Winget asserts here-claims based on the Agent and Black Diamond's actions as to the Debtors, specifically the Deluxe Entities. The complaint alleges that "the Consortium Scheme" engaged in a "coup d'etate over the Deluxe Companies." Complaint at ¶ 35.

In an attempt to circumvent the language of the Sale Order, Winget argues that paragraph 39 only prevents "claims *asserted by* the debtors." The words "asserted by" does not appear in paragraph 39; the relevant language is that claims relating to "acts, conduct, omissions or relationship, contractual or otherwise, *as to* the Winget Entities." are preserved. Winget also argues that the claims involve the Agent and Black Diamond's conduct "as to Winget and not as to [Venture and Deluxe]. This is belied by the complaint, which clearly asserts allegations as to Venture and Deluxe. As explained by the Agent in its reply brief:

> Plaintiffs specify that their "claim is that the sale approved by the Bankruptcy Court was caused by the Consortium's abandoning its duty to Winget as a Guarantor to instead pursue gaining control of PIM and Venco."

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> Pl. Resp. To Agent at p. 5. This allegation directly challenges the express ruling of the bankruptcy court that the "members of the buyer" (i.e. the Consortium), negotiated, proposed and entered into the Sale Agreement "without collusion, in good faith."

Agent's Reply at p. 3.

Winget's argument that his claims were not ripe in the bankruptcy court because he would not have been able obtain the "full defensive remedy" sought in this case, is also unavailing. The only remedy Winget seeks is to extricate himself from the Guaranties and Pledge Agreements because the Agent and Black Diamond (included in the Consortium) sold Venture and the Deluxe Entities at a price which exposed Winget to liability. At the time of the Sale Order, Winget knew that any decrease in value of the Venture or Deluxe Entities would result in a deficiency on the underlying debt and that exposure under the Guaranty would likely result.

D. In the End

Winget has crafted a creative complaint, but it cannot escape the confines of *res judicata*. Winget's allegations of wrongdoing by the Agent and Black Diamond relate to events which could have and should have been raised in the bankruptcy court prior to entry of the Sale Order.

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To the extent that Winget seeks to challenge the "reasonable efforts" provision, which is probably Winget's only arguably legitimate concern, he must wait until the Agent seeks to enforce the PIM and Venco Pledge Agreements. Until such time, claims of wrongdoing by the Agent are premature.

Given this determination, the Agent's motion to strike the jury demand is moot.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: March 7, 2007

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-1657

LARRY J. WINGET, ET AL.,

Plaintiffs-Appellants,

v.

JP MORGAN CHASE BANK, N.A., ET AL.,

Defendants-Appellees.

BEFORE: RYAN, SILER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green
Clerk